IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11489 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STERLITE INDUSTRIES (INDIA) LTD.

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 11489 of 2004
MR SN THAKKAR for Petitioner No. 1
MR JITENDRA MALKAN for Respondent No. 1
..... for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 10/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. The petitioner has challenged, in this petition, the impugned order dated 10.08.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zone Bench, Mumbai (for short "the Tribunal") passed in application no. E/S/1691/04/Mumbai filed in Appeal No.E/2147/04/Mumbai, whereby the learned Tribunal granted conditional stay in favour of the petitioner against recovery of duty, penalty and interest on the condition that the petitioner may deposit Rs.1.50 crores towards pre-deposit and report compliance to it by 13.09.2004.

#. Learned Counsel Shri Mihir Joshi appearing for Mr.S.N.Thakkar for the petitioner, relying on the judgment of the Hon'ble Supreme Court in case of Mehsana District Cooperative Milk P.U.Ltd. V/s Union of India in 2003(154) ELT 347 (SC), submitted that the learned Tribunal has not at all considered the prima facie case of the petitioner on merits and without assigning any reasons for granting conditional stay in favour of the petitioner disposed of his application. Therefore, the impugned order passed by the Tribunal at Annexure `E' dated 10.08.2004 is required to be quashed and set aside by this Court in its extraordinary jurisdiction under Article 226 of the Constitution of India.

#. Learned Counsel Shri Joshi for the petitioner in support of above submissions took us through the entire impugned order passed by the learned Tribunal at Annexure `E' and submitted that the learned Tribunal has merely narrated brief facts in para 3 of its order, in para 4 reproduced the contentions raised by the petitioner before the Commissioner (Appeals) and in para 5 judgments of the Tribunal sought to be relied upon by the petitioner have been reproduced by the learned Tribunal and in para 6 the Tribunal has stated that how the Commissioner, Central Excise has elaborately dealt with the contentions raised by the assessee in his order and in para 7 without dealing with the submissions of the petitioner passed an order of conditional stay. He submitted that the Tribunal has committed factual error in para 7 of its order by observing that there was a part payment of Rs. 5,83,97,856/- (paid during the period from May, 2002 to March, 2003). Mr.Joshi took us through the impugned order Annexure `D' passed by the Commissioner (Appeals) and relevant page 94 wherein supplementary amount of duty paid from May 2002 to March 2003 was narrated. Under the circumstances, Mr.Joshi

submitted that this Court should exercise its extraordinary jurisdiction in favour of the petitioners as the learned Tribunal without application of mind and without assigning reasons in its order and without dealing with the contentions raised by the petitioner before it, passed the impugned order of conditional stay whereby the petitioner is seriously prejudiced.

#. Under Section 35(F) of the Central Excise Act, 1944 (for short "the Act") in any appeal filed under the said chapter the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise Authority or any penalty levied under the Act and the persons desirous of appealing against such decision or order shall have to deposit with the adjudicating authority the duty demanded or the penalty levied pending the appeal. However, under the proviso to Section 35(F), if the appellate Tribunal is of the opinion that the deposit of duty demanded or penalty levied could cause undue hardship to such person then the appellant Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the interest of revenue.

#. Thus, it is clear that deposit of the duty demanded or the penalty levied is a condition precedent when the person files an appeal under Section 35(F) of the Act but under the proviso, the appellate Tribunal has discretion to dispense with such deposit fully or partly subject to certain terms and conditions as deemed fit by the Tribunal. Having carefully gone through the impugned order at Annexure `E' passed by the learned Tribunal, it appears that in para 7 of the order, the learned Tribunal has observed as under :

> "7. After giving due consideration to the submissions made by both sides and further having regard to the part payment of Rs.5,83,97,856/-(paid during the period from May 2002 to March 2003), we feel it appropriate at this prima facie stage to direct the appellant to deposit Rs.1.50 crores towards pre-deposit and report compliance by 13.09.2004, subject to which stay is granted from further recovery of duty, penalty and interest. Petition is disposed of accordingly."

#. It prima facie gives us an impression that the contentions raised before it have not been specifically dealt with by the learned Tribunal in its impugned order. However, conjoint reading of the entire order makes it

clear that the learned Tribunal has kept in mind all the contentions raised before it by the petitioner and it appears that it has rightly refrained itself from dealing with the said contentions and answer it at this stage in the application as the same were required to be gone into and decided on merits while deciding the main appeal no. E/2147/04/Mumbai filed by the petitioner finally. From para 7 of the impugned order passed by the learned Tribunal, it is clear that the learned Tribunal has directed the petitioner to deposit only Rs. 1.50 crores towards pre-deposit and not full amount and on that condition stay was granted against recovery of duty, penalty and interest.

#. Coming to the judgment of the Hon'ble Supreme Court in Mehsana District Cooperative Milk P.U.Ltd. (supra) which is sought to be relied upon by the learned counsel Shri Joshi in favour of the petitioner, it appears to be a case where the order passed by the Commissioner (Appeals) under Section 35 of the Act and by the impugned order the Commissioner (Appeals) directed the petitioner to deposit an amount of Rs. 30 lakhs by way of pre-deposit. The Hon'ble Apex Court found the reasoning assigned by the Commissioner (Appeals) while passing such order wholly unsatisfactory and that he had not considered the prima facie merits of the case while passing the order in question before the Hon'ble Supreme Court and only concentrated upon the balance of convenience. Therefore, the Hon'ble Supreme Court observed that the appellate authority should have addressed its mind to the prima facie merits of the appellants' case and upon being satisfied of the same determined the quantum of deposit taking into consideration the financial hardship and other such relevant factors. Accordingly, the impugned order passed by the appellant authority was quashed and set aside by the Apex Court including the order of the Hon'ble High Court not interfering with the order of the appellate authority and the matter was directly remanded to the appellate authority for redetermining the issue under Section 35(F) of the Act after affording an opportunity of hearing to the parties.

#. As stated earlier, we have been taken through the impugned order at Annexure `E' passed by the Tribunal by learned counsel Shri Joshi and having carefully gone through the same we are of the considered opinion that the learned Tribunal has rightly refrained itself from deciding the contentions raised before it on merits. Otherwise, it would have seriously caused prejudice to the case of either parties. While granting interim stay

on condition, the appellate authority or the Tribunal must necessarily keep in mind all the relevant facts and circumstances of the case before it or him and pass appropriate order. In the instant case, when the learned Tribunal has rightly exercised its jurisdiction and passed conditional order on the merits before it then such an order cannot be interfered with by this Court in supervisory jurisdiction under Article 227 of the Constitution, the scope of which is very narrow and limited as held by the Supreme Court in case of Mohd. Yunus V/s Mohd. Mustaqim and others reported in AIR 1984 page 38. The view taken by the Hon'ble Supreme Court is consistently followed till today which is in turn followed by this Court.

#. Before parting, it may be stated that this petition is labelled as petition under Article 226 of the Constitution of India but strictly speaking it is a petition under Article 227 of the Constitution of India. Even assuming for the sake of argument that the petition was maintainable under Article 227 of the Constitution of India, then also this Court would have refrained itself from exercising its extraordinary jurisdiction on the peculiar facts and circumstances of this case.

##. In view of this, this petition fails and is summarily dismissed.

##. At this stage, a request is made by learned counsel Mr.Joshi for the petitioner to extend the date of depositing the amount of Rs.1.50 crores which was to be deposited by the petitioner before the Tribunal on or before 13.09.04, without prejudice to his rights and contentions, on the ground that the impugned order passed by the Tribunal on 10.08.2004 was received only on 30.08.2004 and without wasting much time, the petitioner had approached this Court by way of this petition at the earliest. Having regard to the facts and circumstances of the case, request is granted and the petitioner is given three weeks time to deposit Rs.1.50 crores.

(B.J.SHETHNA, J)

(SHARAD D DAVE, J)

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